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Protecting Our Spies—and Our Rights

Taking Exception

I must take exception to a Post editorial ("The Philip Agees, the Louis Wolfs," July 23) concerning pending House and Senate bills that would make it a crime to disclose the identities of certain undercover U.S. intelligence officers and sources.

In concluding that both bills—HR4 and S391—violate the First Amendment, the editorial revealed a lack of understanding of a significant difference between the two bills and failed to take note of language added by the House Intelligence Committee before it adopted HR4 on July 22.

First of all, both bills distinguish between defendants who have had authorized access to classified information and those who have not. As to either category, both bills require proof that a proscribed disclosure was intentional, that the identity disclosed was properly classified and that the defendant knew it, and that the defendant also knew that the government was taking affirmative measures to keep the identity secret.

Each bill requires two additional elements of proof when the defendant has had no access to classified information. The first element is essentially the same in both bills: the government must establish that the disclosure occurred as part of a course of conduct, the purpose of which was to uncover and expose the identities of undercover agents. The second element is where the fundamental distinction between the two bills arises.

Under the House bill, the government must prove that the course of conduct was engaged in "with the *intent* to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure." The Senate bill, on the other hand, requires that the course of conduct be engaged in "with *reason to believe* that such activities would impair or impede the foreign intelligence activities of the United States."

The difference between specific "intent" and "reason to believe" is crucial to an understanding of the bills' constitutionality. I believe HR4 is fully protective of First Amendment rights because it demands proof that the defendant acted with the intent to achieve the particular, evil-end results proscribed by the bill.

In legal parlance, the House bill creates a specific "intent crime." At the opposite end of the spectrum is a criminal offense, such as is created by the Senate bill, which posits negligence as a standard for conviction. That is what "reason to believe" does. It allows the jury to find guilt if it is satisfied *not* that the defendant intended a bad result, nor even that the defendant knew a bad result would follow, but rather that the defendant should have known the bad result would occur.

To my mind, to permit conviction upon such proof for the act of publishing information that may have been obtained from open sources raises grave constitutional questions. As has been suggested, the negligence standard could sweep within its net or have a chilling effect on investigative reporters who seek to expose governmental abuses, scholars who seek to elucidate historical events or organizations seeking to police their own memberships. The specific intent standard of HR4 admits no such possibilities. It ensures that the legislation affects the conduct of only those who disclose for disclosure's sake and are in the business of naming names, i.e., those who are systematically engaged in the purposeful enterprises of seeking out and revealing the identities of undercover officers and sources with the intent that the foreign intelligence activities of the United States be impaired by the disclosure itself.

It was precisely to ensure that the bill's proscriptions applied only in that way that the House Intelligence Committee, in the other major difference from S391, amended the bill to add the words "by the fact of such identification and exposure" to the specific intent section.

Both bills—HR4 and S391—would, as the CIA's former general counsel, Daniel Silver, has stated, permit a successful prosecution of such individuals. HR4 does so without violating the Constitution.

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